United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

75-4021

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P/S

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS & DISTRIBUTORS, NO. 75-4021
WARNER BROS., ET AL., NO. 75-4024
SANDY FRANK PROGRAM SALES, INC., NO. 75-4025
WESTINGHOUSE BROADCASTING COMPANY, INC., NO. 75-4026
CBS INC., NO. 75-4036

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA

Respondents,

AMERICAN BROADCASTING COMPANIES, INC.,
NATIONAL BROADCASTING COMPANY, INC.,

Intervenors.

ON PETITIONS FOR REVIEW OF AN ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR AMICI CURIAE

NATIONAL BLACK MEDIA COALITION

NATIONAL ORGANIZATION FOR WOMEN

NATIONAL CONGRESS OF HISPANIC AMERICAN CITIZENS (formerly RASSA)

ST. LOUIS BROADCAST COALITION

COMMUNITY COALITION FOR MEDIA CHANGE

ALABAMA MEDIA PROJECT AND ALABAMA CIVIL LIBERTIES UNION

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING

OFFICE OF COMMUNICATION, UNITED CHURCH OF CHRIST

AMERICAN CIVIL LIBERTIES UNION

PUERTO RICAN MEDIA ACTION AND EDUCATIONAL COUNCIL

OAKLAND MEDIA

SAN FRANCISCO COMMITTEE ON CHILDREN'S TELEVISION

MEDIA ACCESS PROJECT

March 3, 1975

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QUESTIONS PRESENTED

Whether the Commission reasonably reaffirmed the Prime Time Access Rule on the grounds that it serves the public's paramount interest under both the First Amendment and the Communications Act in maximizing local responsibility for production and selection of a significant portion of prime time television programming.

Whether the Commission, in adopting broad exemptions to the Prime Time Access Rule and thereby allowing the networks to re-enter the access market to an unspecified degree, has irrationally and arbitrarily undermined the Rule's ability to achieve valid and necessary constitutional and statutory goals.

INTEREST OF AMICI

Amici are nonprofit organizations comprising a majority of the 23 public groups who participated in the Comission's proceedings leading to adoption of its most current version of the Prime Time Access Rule.[1/] (This rule is hereinafter referred to as PTAR III)

1/ See Appendix B and footnote 13 of the Commission decision.

Amici and other such groups participated in this proceeding at the invitation of the FCC, which acted in response to this Court's warning on remanding PTAR II last June, in NAITPD v. FCC, 502 F.2d 249, 257-58 (2d Cir. 1974), that:

> The Commission may reach compromises, [citations omitted], but it may not simply compromise between the interests of different broadcasting groups and gloss over the more fundamental public interest.

As this Court had noted, the Commission in adopting its last version of the Rule had concentrated primarily on the comments of the two major economic interests involved--producers and broadcasters. Id. at 258. Now those interests are before this Court, either attacking or defending the rule as revised for the second time. The voluminous documents they have submitted to the Court may appear to raise all potential issues of importance to this appeal.

Consumer, minority, citizen access, and other public groups, however, comprised almost one-half of the total number of parties filing comments below. All of these groups have had substantial, ongoing interest and experience

in communications regulation at the national or local levels. Their participation insured that the Commission had before it a vital element of the public interest determination it had to make in revisiting the Rule. Amici respectfully believe that, just as this Court has recognized that the views of such non-economic interests should be given substantial weight at the administrative agency level, so should they be given similar weight at the appellate level.

INTRODUCTION

Amici participated in the Commission's proceedings below, and have entered this proceeding, because of a desire to support the underlying mandate of the Commission's action in opening a network free period of prime time television. They believe this to have been a rational and necessary means of furthering the fundamental goals of the Communications Act and the First Amendment. The Prime Time Access Rule has served these goals by re-establishing and encouraging the exercise by local broadcast licensees of their basic responsibility for assuring that the public receives programming from diverse sources that meets local problems

and needs. The Rule's reaffirmation by the Commission, on these grounds, and the Commission's recognition of a specific duty to provide local programming within prime time as a necessary underpinning of the rule, is entirely consistent with these constitutional and statutory goals.

Amici are concerned, however, that the Commission has arbitrarily and inconsistently violated the very diversity and localism goals upon which it relied in adopting and reaffirming the Rule. It has allowed network and off-network programming to be substituted during the access period for the local programming and other non-network programming the Rule is designed to encourage. By creating numerous and broad programming exemptions under which network and off-network programming can re-enter the access period, the Commission may well have rendered the Rule incapable of achieving its necessary purposes. Such an inadequately justified result is contrary to rational exercise of an agency's rulemaking authority. This is particularly so when its actions create a substantial barrier to the achievement of its primary regulatory purpose--to provide the

public with suitable access to a diversity of informational and other programming designed to meet their local needs and interests. The exemptions, in sum, are not rationally designed to further the aims of the Rule. Rather, they irrationally undermine it.

On the other hand, amici are also concerned that several parties in this case have launched an overbroad First Amendment attack on the Commission's exemptions of certain types of network and off network programming from the Rule's operation. These parties urge that the exemptions be held per se invalid under the First Amendment. They make no reference, or only secondary reference, to the narrower grounds for reversal that amici urge.

Amici urge the Court not to rest its reversal on an unnecessarily broad attack on F.C.C. program category regulation, for several reasons. First, these arguments are unnecessary to the Court's determination of the validity of the Commission's actions in this case. If the Court's focus rests, as it did in its prior two decisions involving this Rule, upon the paramount First Amendment rights of the public, and the fundamental diversity and local trusteeship goals of the

Communications Act, the Court can resolve this case solely by contrasting the Commission's actual rule, which santions substantial network incursions into the access period, with the underlying goal of the Rule, which is to free control for locally produced and selected programming. Thus the Court can reverse the Commission's exemptions as irrational, without reference to the particular content of the network programming exempted.

Secondly, the fundamental premise upon which the First Amendment arguments of petitioners/intervenors rests is misplaced. They proceed from the assumption of a primary First Amendment right in the licensee, rather than the public, a contention rejected by the Supreme Court in Red Lion and by this Court in Mt. Mansfield. Proceeding from this unsupportable premise, they would have this Court deliver a sweeping and unnecessary blow to 40 years of FCC regulation aimed at assuring that the public will receive certain types of local, informational and other specialized program services.

For this Court to accept that invitation, in a case argued on an expedited schedule, and on an issue tangential to its fundamental task of reconciling the Commission's conflicting actions within the intended scope and aims of the Rule itself, would be both unwarranted and dangerous. It may

well be that, outside the confines of the access period, the Commission can and should encourage the presentation of public affairs and children's programming from various sources, including networks. It has in fact historically done so in its license renewal forms and processes and its recent report on children's programming. And it has a pending docket in which it is examining the need for setting minimum quantitative standards in certain of these same program categories in order for a licensee to qualify for renewal.

Past Supreme Court cases have consistently upheld the fairness doctrine's affirmative requirement that a licensee present a certain amount of public affairs programming--whether network, non-network, or local. For the Commission to quantify that requirement should not offend the unique constitutional and statutory scheme of broadcast regulation.

But that is an issue for another case. Here amici's sole contention, and the only ground this Court need reach, is that the Commission cannot legitimately pursue this or

any other programming goal in a manner that totally undermines the PTAR's fundamental rationale of decreasing network dominance and furthering locally produced and selected programming. It is this question, and this question alone, that this Court needs to decide. If it goes further, it will in effect render an advisory opinion on all Commission attempts to maximize the public's interest in adequate and responsive broadcast service in far different contexts outside the access period.

If the Court does find that the Commission's actions in allowing network and off-network programming to re-enter the access period conflicts with the public's paramount interest in diversity of program sources, it can take limited actions designed to alleviate this conflict. The Court could invalidate these exemptions as inconsistent with the Rule's stated purposes under the First Amendment and Communications Act - - to serve diversity and localism goals. The Court could also remand for a further Commission proceeding solely limited to providing more specificity in its presently vague

warnings that it will allow only minimal network and licensee use of these exemptions, on the ground that this is necessary to protect the public's interest in the effective functioning of the Rule. Or the Court could hold its decision in abeyance pending receipt of a clarifying statement by the Commission as to its intentions in this regard.

At minimum, this Court should affirm the Commission's Second Report and Order solely in specific reliance on its strongly stated commitment to the Communications Act's mandate to protect the public's interest in diversity of prime time programming, including the vital principle of local programming and local decisionmaking. It should, at the least, also include an admonition that any Commission actions that break faith with this commitment--such as allowing the exemptions to swallow the Rule--will be grounds for future Court review of the validity of any and all access period exemptions for network and off-network material.

THE AMICI'S PARTICIPATION IN THE PROCEEDINGS BELOW

As to most of the events in the long history of the proceedings surrounding the adoption and revision of the Prime Time Access Rule, amici will accept the statements of the various parties to and intervenors in this proceeding. Amici wish only to stress those portions of the proceeding related to their own participation herein.

A. Amici's Use of the Original Rule.

As many of the public groups noted in their comments before the Commission, the original Prime Time Access Rule was of critical value to local citizens throughout the country. For the first time in many years the Commission had reversed the trend of broadcast licensee delegation of programming responsiblity to national networking sources. The Rule placed back on individual local broadcast licensees the responsibility to produce and select programs for their individual communities, the fundamental duty they had theoretically held since the adoption of the Communications Act.

In fact, most network affiliates, despite their favored position as trustees of the public's airways and their license to serve as a meaningful local outlet for service to community needs, had become merely conduits for network produced and selected programming for most of the broadcast day. Any

local or syndicated programming of informational value generally, or addressed to the specialized interests of minorities, women, or other groups within the mass audience, were aired almost exclusively, if at all, in the Sunday morning "ghetto" or other inconvenient fringe periods.

Local citizens had for several years been trying to convince broadcasters that such delegation of programming responsibility was inconsistent with their licensee obligations. The Prime Time Access Rule put into public hands, however, a new and powerful tool. No longer could a broadcaster convincingly argue that "We recognize the need for a local public affairs, children's, women's or minority program in prime time, and would love to do it, if we did not have to carry the full network schedule to survive." As a result, local broadcasters had to face an unusual prospect. On their own they would have to devise or select programs that would serve local goals. They would be accountable for these decisions at license renewal. They could not rely on the three-network funnel to make those decisions for them on a homogenized national basis.

The results of the last four years of operation under the Rule have varied from community to community. Success in

achieving the Rule's goal of locally responsive programming has varied with the good faith commitment of each network affiliate to meet this obligation and the effectiveness of the ascertainment and dialogue process it has entered into with local citizens in or order to implement this mandate.

The net increase in local programming designed to meet local needs, however, has been fully documented by amici and other public groups participating before the Commission. Amicus National Black Media Coalition, for example, submitted an extensive list of new commitments by network affiliates since the Rule's adoption to locally produced prime time programming on minority, women's, children's or general public affairs concerns. Amicus National Organization for Women submitted a similar list focused specifically on increased local women's issue programming. Even the network owned and operated stations in the major markets were shown to be presenting at least one local access period public affairs or children's program during the 1974-75 session.

B. The Localism Impetus of PTAR II.

An additional impetus was given to this healthy development during the Commission's adoption of its first modification of the Rule (PTAR II) in February 1974. This Report stated:

> Although not stated in the rule, it is expected that some of the five or six half-hours thus 'cleared' of network, off-network and feature film material will be used by stations for programs relating to minority affairs, children's programs, or other programs directed to the needs and problems of the station's community and coverage area, as disclosed in its ascertainment process. 1/

The Commission later elaborated on this paragraph, reemphasizing the importance of the Rule's localism aim: 2/

> 88. Use of "cleared" 7:30 periods for locally significant material. It is important to set forth here our expectations in this connection. We expect that stations subject to the rule will devote an appropriate portion of this 'cleared' time, or at least of total prime time, to material designed for children, material which is of particular significance with respect to interests, problems, and affairs of minority groups, and/or other material particularly directed to the needs and problems of the station's community or coverage area as disclosed in its regular efforts to ascertain community needs. Such programming efforts are necessary if the benefit of the rule in stimulating locally meaningful programming is to be significantly achieved, as well as to carry out the licensee's obligation to serve the public interest. We point out, however, that programming of the significant character mentioned need not necessarily be all locally produced: a syndicated program such as Black Omnibus may well represent significant programming in the minority affairs area. [Emphasis added].

1/ Report and Order, Prime Time Access Rule, (Docket No. 19622) 44 F.C.C. 2d 1081, 1082 (¶3) (1974).

2/ Id. at 1136-37 (¶38).

This language was, of course, officially placed in abeyance along with the remainder of PTAR II by this Court's remand order last June. Nevertheless, it at least underlined the Commission's intended priorities in implementing the existing Rule. It was so interpreted and productively utilized during the past year in the ongoing dialogue process between broadcasters and local citizens on the adequacy of local service.

C. Amici's Presentations in PTAR III.

When the Commission reinstituted the proceedings which resulted in the modification of its Rule now before this Court, amici and other organizations representing citizens engaged in this dialogue throughout the country were vitally concerned. Any Commission action to diminish the access period would cause this first blooming of local responsibility to wither and die.

Of the 23 public groups filing comments in this proceeding, all but one vigorously supported retention of the Rule. They opposed with equal vigor any reentry of network programming into the freed access period, such as the two night per week cutback authorized by PTAR II, the modification remanded by this Court last spring. Far from asking for the exemptions for network public affairs, children's or other

program categories contained in the Commission's ultimate decision, they opposed the then-existing system of waivers for certain types of network programming as unjustifiably destructive of the Rule's paramount goals.

Amici and the other public groups agreed that network programming in such areas was beneficial. Some would urge that the Commission stimulate such programming in non-access periods. But they noted that under the existing Rule there was no restraint whatsoever placed by the Commission upon networks' offering such programming during the other three hours of prime time they could still program each evening, or during the daytime. And nothing prevented the networks, from scheduling programming for children in the early evening and allowing licensees to program the access period at a later hour. The networks' parallel decision not to offer programming during the 7:00 to 8:00 time slot was totally of their own economic choice.

D. The Commission's Consideration of Amici's Comments.

The Commission did take these comments into account, at least in part, in readopting the Prime Time Access Rule this January. It reemphasized, as it had in PTAR II, that the Rule's primary objective was to serve the public's interest in locally responsive service:

> 14. In evaluating the arguments of the majors and other opponents of the rule, it is important to bear in mind the rule's primary objectives: to lessen network dominance and free a portion of valuable prime time in whichlicensees of individual stations present programs in light of their own judgments as to what would be most responsive to the needs, interests and tastes of their communities.

The F.C.C. cited the local programming activities stimulated by the Rule, mentioning the examples cited not only by the public groups, but by local affiliates as well, as "tangible evidence of the benefits flowing from the rule". (¶15). Beyond the mere statistical showing was the fact that decision-making was now independently exercised on the local level. (Ibid). This could lead to even greater increases in prime time programming addressed to significant local issues and interests in the future.

In fact, the Commission prominently included and emphasized language in its Order to insure that licensees who had not previously recognized this as their specific obligation under the Rule would finally get the message. In the initial paragraph of its January 1975 Report and Order, the Commission called attention to Paragraph 60, where, it stated, "we set forth our view that the public interest requires stations subject to the rule to devote a substantial proportion of prime time to programming of particular local significance."

Paragraph 60 reads, in full:

> 60. As mentioned above, one of the really significant benefits from the rule is its impetus to the development of local programming efforts, and this is one of the principal reasons for retaining it in a form close to PTAR I. We expect that stations subject to the rule will devote an appropriate portion of "cleared time," or at least of total prime time to material particularly directed to the needs or problems of the station's community and area as disclosed in its regular efforts to ascertain community needs, including programming addressed to the special needs of minority groups. Such programming efforts are necessary if the benefit of the rule in stimulating locally meaningful programming is to be significantly achieved, as well as to carry out the licensee's obligation to serve the public interest. We point out, however, that programming of the significant character mentioned need not necessarily be all locally produced. Syndicated or network programming, where it deals with needs or problems common in substantial degree to many communities, may also make an important contribution.

The last sentence of this paragraph is inconsistent with the Commission's February 1974 statement on this same subject. It includes network programming, along with independently syndicated programming, as an additional alternate source of locally responsible responsive programming that in some instances might be carried during the access period. The Commission's use of the words "need not necessarily be all locally produced" does carry the strong implication that any allowed deviations from use of locally produced material in the licensee's required showing of local responsiveness will be de minimus. But, as outlined below, amici believe that the Court must act to insure that this small previously network-free market for local and other independent programming is more strictly protected.

Since the local programming requirement in Paragraph 60 was not made a formal portion of the rule, amici assume that it will be enforced by the Commission primarily through the license renewal process. Thus, licensees will be required to supplement their triennial accounting of stewardship to their community of license by showing that locally produced programming, developed as part of their ongoing dialogue with the public, was presented not merely in fringe audience periods but in prime time.

This is, in amici's view, the most significant public benefit to be derived from the Commission's January 1975 revision of the Prime Time Access Rule. It is, in short, nothing less than the Commission's reaffirmation of the most fundamental purpose of the Act it was organized to implement.

Incongruously, however, in the same January 1975 Order in which it gave ringing endorsement to this principle, the Commission rejected the arguments of amici and other public groups that any exemptions allowing network programming of whatever type to reenter the access market would create an untenable conflict with the very localism and diversity goals sought by such groups and the Commission. (¶¶ 36, 37). The FCC took note of the overwhelming unanimity of these comments on this point. But it mischaracterized them as springing from a belief that network programming was of little public value.

It also implied that such groups felt network public affairs and children's programs should not be "permitted" to "expand" if "there is the slightest chance that the cause of localism in prime time television would be impaired" (¶37).

To the contrary, as previously noted, several public groups had fully explained that the networks had no impediment whatsoever to expansion of this programming, and the Commission gave no rational ground for a finding that such an impediment existed. Its Order, by reaffirming the original Rule's concept of a floating access period, at the option of each station, removed the only potential barrier, which had briefly existed during the life of PTAR II (which set 7:00 to 8:00 as the standard access period).

Nor did these groups regard the impact of a potentially open-ended network access reentry as having only a "slight effect" upon effective fulfillment of the Rule's localism and diversity goals. They regarded this as undermining the very existence of the Rule.

ARGUMENT

I. TESTED UNDER THE SAME STANDARDS UNDER WHICH THIS COURT DECIDED MT. MANSFIELD AND NAITPD--FURTHERANCE OF THE PUBLIC'S PARAMOUNT DIVERSITY RIGHTS AND THE FUNDAMENTAL LOCALISM GOAL OF THE COMMUNICATIONS ACT--THE COMMISSION'S SANCTION OF NETWORK ENTRY INTO THE ACCESS PERIOD IS ARBITRARY AND IRRATIONAL.

A. The First Amendment and Statutory Standards Applicable to this Case Render It Unnecessary to Reach the Broader Constitutional Questions Urged by Petitioners.

All of the petitioners and the intervenors to date have focused heavy First Amendment artillery upon the Commission's actions in its Second Report and Order. It seems unclear precisely how far each wishes this argument to take the Court. At least Warner Bros., et al., the major producers of programming for the networks, argue that Commission actions that touch upon licensee programming judgments are grounds for invalidating the entire Prime Time Access Rule. NAITPD, Sandy Frank, Westinghouse and CBS all appear to be arguing for a more limited position. They argue that either the Commission's Order should be invalidated only insofar as it adopts exemptions for certain network or off-network programming, or that the Order should be totally reversed, leaving in effect the original

Rule, and likewise effectively eliminating these exemptions.

Amici agree with the latter position, or other Court action to limit the potential adverse impact of the exemptions upon the Rule's achievement of its goals. But they do not agree with the grounds urged for this action, which represent an unwarranted (or at best premature) attack on the basic constitutional and statutory scheme of broadcast regulation.

The First Amendment arguments of the broadcasters and producers are familiar to this Court. Twice before this Rule and its modifications have been subjected to First Amendment attack. Both times the petitioners have charged the Commission with impermissible activity in regulation of broadcast programming. In both cases, once explicitly and once by implication, this Court has indicated that communications regulation cannot be based exclusively upon a narrow view of the First Amendment as protective primarily of the rights of the broadcasting industry. Here again petitioners and intervenors fail to follow the authoritative view of the priorities of First Amendment values enunciated by the Supreme Court in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

The broadcasters/producers' overbroad attacks fail to come to grips with the basic rationale for analysis of the Prime Time Access Rule this Court initially adopted in Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971). In so doing, they obscure the fact that the Court can decide this case with reference to the diversity and localism values emphasized therein, and the Commission's own bases for reaffirmation of the Rule, without reaching a broader decision on the validity of any Commission decision affecting broad categories of public service programming.

When tested against the dictates of the Red Lion/Mt. Mansfield constitutional and statutory values, it seems clear that while in other contexts the Commission might permissibly act to further the public interest in receiving certain types of program service--such as those contained in the network and off-network exemptions at issue here--it cannot do so in a manner that arbitrarily undercuts its own mandates. It is required to foster the public's access to information from diverse sources, including local programming that serves the basic allocations scheme of the Communications

Act. And it has itself found that a substantial period of prime time within which a licensee cannot allow a network to produce or choose its programming is a necessary means to achieve these ends.

This Court devoted much of its Mt. Mansfield opinion to the primacy of the public's rights in the broadcasting medium. It emphasized that "the extent of permissible regulation under the First Amendment is not identical for all means of communications." 442 F.2d at 477. And it stated that "the peculiar characteristics of the broadcast medium require the application of constitutional standards to their regulation which differ from those applicable to other types of communication." Ibid.

When a potential conflict occurs between the broadcasting industry's private interests and the public's interest in the effective functioning of the broadcast stations allocated to their communities, "The Supreme Court has ruled that the public's right to access must prevail" because of "their collective right to have the medium function consistently with the ends and purposes of the First Amendment." Ibid.(citing Red Lion, 395 U.S. at 390).

Viewed through this lens, the Prime Time Access Rule was held by this Court to further the central First Amendment value in broadcast regulation--"the public's ability to receive diverse programming." Id. at 478 (citing NBC v. U.S., 319 U.S. 190, 226-27). That the rule "might well impose a very real restraint on licensees" as to their choice of certain programming for a specified portion of time was held to be of subsidiary importance when measured against this goal. Ibid.

Similarly, the Mt. Mansfield Court found that the Communications Act authorized the Commission to engage in affirmative regulation in programming areas through its statutory mandate to "encourage the larger and more effective use of radio in the public interest." Id. at 479 (citing 47 U.S.C. 303, 303(g)). This, held the Court, included adoption of regulations designed to encourage and enhance a licensee's ability to provide "the best practicable service to the community reached by his broadcasts." Ibid. 1/

1/ Citing FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940).

The Court took specific note of the "public trustee" basis of the entire communications regulatory scheme. Id. at 480. The Prime Time Access Rule was found to be entirely consistent with this system of regulating broadcasting in the public interest of particular localities. 1/

Three years later, in NAITPD v. FCC, 502 F.2d 249, (2d Cir. 1974), this Court, while presented with similar issues, did not reach the question of the Commission's powers on the merits. But in finding the FCC's actions potentially subject to procedural attack, it again noted "the primacy of the interests of the viewing public in the FCC's exercise of its powers," citing Supreme Court decisions based on both First Amendment and statutory grounds. Id. at 257.

Petitioners have provided no justification for their abandonment of this traditional First Amendment

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1/ While noting petitioner's arguments that "censorship" was forbidden to the Commission under Section 326 of the Communications Act, 47 U.S.C. 326, the Court gave that provision a properly narrow reading in view of the public's paramount interests in realization of the full benefits of the broadcasting medium, necessarily including Commission action to secure those benefits through actions affecting licensee programming choices.

approach for a renewed attack on the Rule's recent revisions as creating constitutionally impermissible infringements on licensee First Amendment interests. Their arguments that the Court should pose the issues before it in terms of unconstitutional conditions on licensee choice are unnecessary and inappropriate to the Court's decision. They are extensively based on Supreme Court cases both before and after Red Lion that deal with First Amendment questions relating to totally different forms of communication. 1/ None of these cases addressed the unique public trustee status of broadcasting.

Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973) is the only cited case since Red Lion to address this question, and it discussed at length and reaffirmed Red Lion. In fact, its fundamental rationale for refusing to impose, absent Congressional or Commission findings of its necessity to assure public First Amendment values, a specific right of access to the broadcast

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1/ E.g., Interstate Circuit Inc. v. Dallas, 390 U.S. 676 (1968) (motion pictures); Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) (picketing); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (newspapers).

medium inhering in any private party desiring to use it, was the existing obligation of broadcasters to air certain types of programming in a certain manner under the fairness doctrine. As it noted, the fairness doctrine uniquely and constitutionally "imposes two affirmative responsibilities on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints". 412 U.S. at 111. This narrow decision, which rested on a pre-existing limitation on licensee discretion in favor of public First Amendment rights, and even left the Commission free to devise a limited individual right of access scheme in the future, cannot be regarded as justifying this Court's shift of First Amendment focus from the public to the broadcasting industry. 1/

B. The Commission in Its 1975 Report and Order Failed to Adequately Justify Allowing Network Entry into Access Time, Contrary to the Position of the Amici and the Constitutional and Statutory Goals Behind the Rule's Adoption.

Among the regulatory steps besides the Fairness Doctrine the Supreme Court noted approvingly in CBS v. DNC that the Commission had taken "to expand diversity of expression" was the Prime Time access Rule. Id. at 112. n. 10. The Commission's

1/ See also Citizens Committee to Save WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974), where another Circuit recently ordered the Commission to take an affirmative role in content regulation to the extent of determining, within economic restraints, optimal programming formats for particular stations and markets, "before allowing diversity, serving the public interest because it serves more of the public, to disappear from the airways." Id. at 268.

recent actions in allowing network re-entry into the access period are in direct conflict with this touchstone of the Rule as interpreted by the Commission itself, not only in its initial adoption, but also in the very Order upon review.

In explaining in the Second Report and Order why it was retaining the basic Prime Time Access Rule in its original form, the Commission found that network dominance of prime time "is reduced by the requirement of cleared or access time, and that certain public advantages have resulted." (¶15). These included the evidence of stimulation of local programming activities provided by amici, other public groups, and local licensees, and the "freeing [of] licensees to exercise their own programming judgments. Ibid. The Commission as noted above, identified local programming efforts as "one of the really significant benefits from the rule. . .and . . .one of the principal reasons for retaining it in a form close to PTAR I." (¶60).

This was proper, considering the great weight the Court had indicated the Commission should give to the comments of public groups. Yet, as Sandy Frank points out

at length in its brief (pp. 74-81), the Commission thereupon totally and inexplicably reversed its emphasis upon reducing network dominance and increasing the public's diversity and localism benefits, in order to effect a compromise between competing economic interests. This was precisely what this Court had warned the Commission not to do.

The Commission, with, as pointed out above, totally inadequate justification, found that certain types of network programming were being inhibited by the Rule. It then riddled the Rule with exemptions through which could regain a strong foothold in the access period. The only reasons the networks may not have presented sufficient programming of these types in their remaining 75% of prime time were totally grounded on their own economic self-interest. The Commission in effect acceded to that self interest by offering them an opportunity to obtain additional prime time without disturbing their mass audience profits from the remainder of the programming day.

This action is totally inconsistent with the Commission's duty to avoid actions furthering private interests at the expense of the public's paramount rights. It gives the monopolist the Rule was adopted to curb the stimulus to present this type of programming, rather than encouraging the local or independent programming of this type the Rule was designed to foster.

This is contrary to the proper view of the Commission's function outlined in Red Lion and Mt. Mansfield.

Contrary to the arguments of the broadcasters and producers, the fundamental question before this Court is not whether the Commission can validly seek to attain public interest goals by stimulating certain kinds of programming, including network programming. As shown below, parallel actions have been taken by the Commission as an ordinary and necessary part of its function. The valid and immediate question is whether it had any rational basis for doing so here, in the access period alone, where such actions would come into direct conflict with other overriding constitutional and statutory goals of its regulatory scheme.

Why, if such programming was a necessary portion of the public interest, did the Commission not take steps to stimulate its presentation outside the access period? And how can it justify its actions in the face of virtually unanimous agreement on the part of all public parties to this proceeding that stimulation of this programming through a waiver or exemption policy solely focused on the access period was a price the public was unwilling to pay.

To paraphrase NAITPD "If [local] public affairs programs now in existence are so influential in the judgment to retain the rule, their sacrifice in order to encourage [network] public affairs programs is not easily comprehensible." (Brief, p. 50). In fact, the Commission's reasoning is so impenetrable that the Court cannot properly "satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent".[1/] It has violated this Court's mandate last spring in NAITPD v. FCC[2/] that upon remand it must not only create a record that allows for public input, but it must also "identify the public interest basis for its actions." 502 F.2d at 257.

At least two of the parties, in addition to attacking the exemptions as inherently suspect under the First Amendment, recognize and support this ground for reversal or modification of the Commission's Second Report and Order. See NAITPD Brief (pp. 36-64); Sandy Frank Brief

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1/ Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850 (D.C. Cir. 1970).

2/ Citing Greater Boston and WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

(pp. 29-66). The Court should read these well-reasoned portions of these briefs with care, if it agrees with amici that such narrower constitutional, statutory, and procedural grounds should be the threshold consideration for determining the validity of the Commission's amendments to the Rule.

C. If the Court Finds It Necessary to Reach the Constitutional Questions Urged by the Broadcasters and Producers, It Should Not Disturb the Commission's Traditional Power and Duty To Require Licensee Program Service Responsive to Community Needs.

The foregoing argument has tried to present this Court with adequate reasons why it need not and should not reach the contention that the Commission, by providing exemptions to its Prime Time Access Rule for children's and informational programming, violates the First Amendment because it sets up categories of preferred programming. Amici strongly urge the Court to consider that this argument, if adopted, would undermine entirely the basic Congressional and Commission scheme in the broadcast field.

In effect, the Court would be ruling that the Commission's renewal forms, which require submission of annual and triennial reports on the amount of local, public affairs,

news, other informational, and children's programming carried,[1] and its renewal processes, which take such information into account,[2] are illegal. It would invalidate recent Commission proceedings like its 1974 Children's Television Report and Policy Statement, which held that a licensee's public trusteeship requires it to provide a reasonable amount of children's programming, with a "reasonable part ...educational in nature".[3] It would likewise invalidate the Commission's effort to rationally and specifically delineate the standards for license renewal by quantifying certain minimum levels of program service in local, informational and other programming categories.[4] Judicial restraint is clearly called for in this case, where no such sweeping and drastic action is warranted.

First, the Commission has allocated a large amount of the radio spectrum to broadcasting, as compared with other

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1/ See Renewal of Broadcast Licenses, 38 F.R. 28762 (1973); TV License Renewal Form Amended on Children's Programming, F.C.C. Report No. 10279, January 27, 1975.

2/ See Report and Statement of Policy Re: Network Programming Inquiry 25 F.R. 7291 (1960)

3/ Children's Television Programs (Docket No. 19142), 39 F.R. 39396, 39397 (¶19) (1974).

4/ See Notice of Inquiry in FCC Docket No. 19154, 31 FCC 2d 443 (1971). Significantly, the Court of Appeals of the District of Columbia Circuit has encouraged such a rule making as a means of creating more certainty in the licensing scheme. See Citizens Communications Center v. FCC, 447 F.2d 1201, 1213 n. 35 (D.C. Cir. 1971); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 854 (D.C. Cir. 1971).

uses, mainly for two reasons: (1) to carry out the Congressional scheme of local broadcast outlets;[1/] and (2) to obtain fully the contribution that broadcasting can make to an informed electorate.[2/] If a broadcaster does not serve in any effective way as a local outlet or make a contribution to an informed electorate, it is undermining the basic allocations policy of the Communications Act.

Clearly, the Commission can therefore be concerned with the broadcaster's efforts to provide local and informational programming at the time of original license grant and at renewal. And if the Commission can properly be so concerned in its licensing actions, it can similarly act to promote these Congressional goals in its rule making endeavors.[3/] Indeed, the Supreme Court has made clear in Red Lion that the Commission ". . .neither exceed[s] its power under the statute nor transgress[es] the First Amendment in interesting itself in general program format and the kinds of programs broadcast

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1/ See Section 307(b), 47 U.S.C. 307(b); Sen. Rept. No. 1526, 87th Cong., 2d Sess.

2/ See Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1248, 1249 (1949); Storer Broadcasting Co., 11 FCC 2d 678 (1968). Section 315(a), 47 U.S.C. 315(a), makes clear that this informational requirement is a Congressional one.

3/ See U.S. v. Storer Broadcasting Co., 351 U.S. 192 (1956); FCC v. American Broadcasting Co., 347 U.S. 284, 289-90, n. 7 (1954), Sections a(i), 303(r), 47 U.S.C. 154(i), 303(r).

by licensees [citing NBC v. U.S., 319 U.S. 190 (1943)]".[1]

No petitioner has argued that the Commission's favoring of local programming in its Rule, and mandate of its presentation, violates proper Commission functions. Nor can their attacks on a similar affirmative requirement to present public affairs, documentaries or other forms of informational programming withstand scrutiny. In Red Lion the Court stated that "It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern," and the Commission can". . .insist that[licensees] give adequate and fair attention to public issues . . .".[2] The present Commission rule making thus does not fall simply because of its emphasis on informational programming.

Nor is it deficient because of its focus on children's programming. Admittedly children's television service was not a basis for the FCC's original local allocations system. But television has taken its place as a powerful new force for socialization and value formation in children.[3] The Commission's

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1/ Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 393 (1969).

2/ Id. at 394-95.

3/ Pre-school children (2-5) watch television an average of 22.6 hours a week. Nielsen, NAD, 1970/71 Season. The average high school student, by the time of graduation, has spent 11,000 hours in school and 15,000 hours watching television. President Nixon, Message on Education Reform to the Congress of the United States, March 3, 1970.

recent Children's Television Report and Policy Statement, supra, has recognized that television is now playing an extraordinary role in relation to children, and requires a commensurate licensee response.[1/] It follows that the FCC can properly be concerned in its overall rulemaking actions with an area so impressed with the public interest.

In short, the petitioners are arguing as if the Commission were saying that licensees must give preference during the access period to religious programs or "serious drama" or "talk shows". That is not the case. The Commission's concern here, as in its other program regulation actions, is with bedrock public interest areas of programming. To adopt petitioners' arguments in this respect would be truly to throw the baby -- the whole Congressional and FCC scheme -- out with the bath water -- the Commission's confused, irrational and inconsistent dealings with prime time access.

1/ The Children's Television Report thus stands on the same footing as the 1949 Editorializing Report, supra, delineating the need for informational programming.

D. The Court Should Take Affirmative Steps to Require the Commission to Remedy the Inconsistencies in its Rule and Insure a Specific and Substantial Period Free of Potential Network Incursions.

The Commission, perhaps realizing the fundamental illogic of its attempt to meet simultaneously the concerns of amici and other public petitioners and the private concerns of the networks, attempted in Paragraph 34 of its 1975 Report to cure those defects. But its horatory language about restricting licensee abuse of the network exemptions does not provide sufficient specificity to allow licensees to plan their local programming efforts, or independent producers to target their offerings. Without a firm, assured and substantial access period, which does not shift with the Commission's current perception of the allowable maxim of network access programming, the Rule's intended goals are incapable of attainment.

Amici would argue that any exemption for network and off-network programming of the type contemplated in subsection (1) of the revised rule creates an unsupportable loophole in the Rule's operation.

Nevertheless, this Court may disagree and wish to avoid further reversal and delay in this long unsettled matter.

If so, the Court could hold its decision in abeyance pending a requested submission from the Commission to the Court as to a limitation on use of network exemptions (e.g. 20% of prime time access slots) beyond which a license could not go.

Barring this option, the Commission's 1975 Order should be remanded to the Commission for the limited purpose of placing safeguards on an assured access market for local and other non-network programming.

If, however, this Court finds this deficiency in the Commission's Order not ripe for judicial resolution until abuse is shown, it should uphold the Commission's Order on the explicit basis that if abuse of the exemptions is shown in practice to frustrate the public's First Amendment and statutory rights, the Court will not hesitate to entertain again the argument that the exemption scheme should be invalidated on this ground.

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March 3, 1975

CERTIFICATE OF SERVICE

I, Frank W. Lloyd, hereby certify that the foregoing "Brief of Amici Curiae"* was served this 3d. day of March, 1975, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below,

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